PP

v.

ONG SHWU GUAN

HIGH COURT MALAYA, JOHOR BAHRU
KP GENGADHARAN JC
[CRIMINAL TRIAL NO: MT(3)45-57-2002]
5 NOVEMBER 2004

CRIMINAL PROCEDURE: *Defence - Charge of murder - Unsoundness of mind - Complete defence - Accused suffering from psychotic depression bordering on unsoundness of mind which incapacited her from knowing or recalling or understanding what had actually happened*

CRIMINAL LAW: *Murder - Motive - No evidence of any motive for killing - Accused suffering from psychotic depression bordering on unsoundness of mind - Accused retracted her confession - Reasonable doubt created as to whether accused who had killed the child or was it accidental death - Penal Code, s. 302*

EVIDENCE: *Confession - Circumstances leading to confession - Confession made by accused suffering from psychotic depression bordering on unsoundness of mind - Whether unreliable and prejudicial - Whether inadmissible - Motive - Absence of - Evidence Act 1950, s. 8*

The accused was charged with causing the death of her infant daughter aged 10 months. The accused claimed trial to the charge. PW3 (the father of the deceased and husband of the accused) testified that he was at work when he received a telephone call from the accused informing him that their daughter was dead and to inform the police so that the police would arrest her and hang her. According to PW3 the accused had told him on the phone that she had placed the deceased in a water container which was in the bathroom. The Investigating Officer, PW4, testified that when he went to the house to investigate, he met the accused who confirmed to him that she had killed her child. This statement was made before the arrest. Later the accused gave a cautioned statement where the accused admitted putting the deceased child in the container of water. However, the accused subsequently retracted from her confession and claimed that she made up the story that she killed the child because of her suicidal tendencies and blamed herself for the killing so that the police can put her to death. The accused relied on her mental depression to show that the confession was fabricated. PW3 testified that the accused suffered from mental depression and had a history of mental illness and had sought medical treatment. The psychiatrist also gave evidence regarding the accused's mental condition.

Held (acquitting and discharging the accused):

(1) The accused was suffering from psychiatric depression and there was a family history of schizophrenia. The accused was not taking her medication for depression and at the time she was suffering from psychiatric depression and was having suicidal thoughts. With this evidence there was no evidence as to who had placed the child in the water container. There was the evidence that the child could walk and climb the toilet bowl. In such factual circumstances a doubt arose as to whether the child got up from bed when the accused was sleeping, crawled or walked up to the container and tried to climb on top of the toilet bowl and had accidentally fallen into the water container. (paras 32 & 33)

(2) Since there was no evidence of any motive for the killing there was a doubt as to whether the accused in fact had killed the deceased except for her alleged confession. It was highly prejudicial and dangerous to depend solely on the confession made by the accused. The accused had contradicted herself when she retracted the confession. (paras 37 & 39)

(3) A reasonable doubt had been created as to whether in fact it was the accused who had killed the child or whether the death was accidental as claimed by the defence. (para 40)

(4) At the time of the incident the accused was suffering from psychotic depression bordering on unsoundness of mind which incapacited her from knowing or recalling or understanding what had actually happened. It was in these circumstances that the confession was made. Therefore the confession was unreliable, prejudicial and concocted by the accused and to rely on such a confession would be unfair and would defeat the ends of justice. (para 42)

Case(s) referred to:
Ganapathy Rengasamy v. PP [1998] 2 CLJ 1 FC ***(refd)***
Johnson Tan Han Seng v. PP [1977] 2 MLJ 66 ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
PP v. Dato' Mokhtar Hashim [1983] 1 CLJ 138 HC ***(refd)***
PP v. Hanif Basree Abd Rahim [2004] 3 CLJ 700 HC ***(refd)***
Tai Chai Keh v. PP [1948-1949] MLJ 105 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 425
Evidence Act 1950, ss. 8(1), 17

For the prosecution - Juraidah Abbas (Mohd. Nordin Ismail with her); DPPs
For the accused - Freda Sabapathy

Reported by Amutha Suppayah

JUDGMENT

KP Gengadharan JC:

[1] The accused was charged as follows:

> Bahawa kamu pada 16.1.2002 jam lebih kurang 5.13 petang hingga 5.23 petang di rumah No. 8, Jalan Lembing 15, Taman Putri Wangsa, Ulu Tiram, dalam Daerah Johor Bahru dalan Negeri Johor Darul Takzim, telah melakukan pembunuhan dengan menyebabkan kematian kepada Lye Mei Jing, Sijil Kelahiran No. 010306-04-0216 yang berumur 10 bulan dan oleh yang demikian kamu melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun.

[2] The accused claimed trial to the charge.

[3] The Prosecution called four witnesses to support their case *viz*; PW1 L/Kpl Mohd Azami (the photographer) PW2 Dr. Shahidan Mohd Noor (the pathologist) PW3 Lye Eng Kue (the father of the deceased and husband of the accused) and PW4 Mohd Nasyrin bin Baharom (the Investigating Officer).

[4] The facts that emerged from the evidence were that on 16 January 2002 PW3 left home for work at Batu Pahat. The wife (the accused) and the daughter (the deceased) were at home. On the same day at about 5pm PW3 received a telephone call from the accused informing him that their daughter was dead and to inform the police so that the police would arrest her and hang her.

[5] PW3 when recalled under s. 425 of the Criminal Procedure Code further confirmed that the accused had also told him on the phone that she placed the deceased in the water container (P7) which was in the bathroom.

[6] When PW3 returned home at about 9pm he found the deceased in the water container. PW3 then carried the deceased out of the water container and laid her on the floor.

[7] When PW3 asked the accused what happened she kept on repeating that she wanted to die and wanted the police to hang her. PW3 then went to the police station and lodged a report, Ulu Tiram Report 406/02 (P8).

[8] After the Investigating Officer, PW4, was informed of the police report (P8) he and the police photographer (PW1) went to the scene. Photographs were taken of the scene and the deceased. PW4 was informed by PW3 that the accused was suffering from mental depression.

[9] PW4 further confirmed when recalled under s. 425 of the CPC that when he went to the house to investigate he met the accused who confirmed to him that she had killed her child. This statement was made before the arrest.

[10] After taking the necessary photographs and after making inquires the accused was arrested and remanded. Later the accused, on 22 January 2002, gave a cautioned statement (P15) to Inspector Kwek Kea Yap which was admitted in evidence without objection by the defence. In the said cautioned statement the accused, *inter alia*, admits putting the deceased child in the container of water.

[11] It is the Investigating Officer (PW4) who took the body of the deceased to the hospital where the post mortem was done by the pathologist, PW2. The deceased on whom the postmortem was done was identified through photographs by PW2 and PW4. The cause of death was due to drowning as confirmed by PW2.

[12] In the course of the evidence adduced at the prosecution stage it was evident that the relationship between the deceased and her husband PW3 was good and that both loved their child (the deceased). It was also evident that the deceased child was an active child and could walk a few steps. The deceased was seen by PW3 making attempts to climb the cot and also the toilet bowl which was near to the water container (P7).

[13] In the course of the evidence PW3, the husband of the accused, had testified that the accused suffers from mental depression and has a history of mental illness. She has sought medical treatment at the Psychiatric unit of General Hospital Malacca and Johor Bahru. In 1990 the accused had attempted to commit suicide as she was under mental stress while preparing for her University examinations. In fact two weeks before the incident ie, prior to 16 January 2002 the accused worked in a Kindergarten and left employment on 15 January 2002 after working for 14 days on the grounds that the children were naughty, parents are complaining and she was afraid she was not able to teach. She was suffering from depression and was not sleeping well and she was not taking her medication. PW3 further testified that even the siblings of the accused siblings was also under psychiatric treatment at General Hospital, Malacca.

[14] In this case there was no direct evidence to connect the accused to the crime in question. However, there was sufficient circumstantial evidence *viz*;

(i) the admission made by the accused to her husband (PW3) that she put the deceased into the water container was accepted by the court under s. 17 Evidence Act, 1950.

(ii) the confession made to police ie, to PW4 before the accused was arrested that she killed the deceased was accepted by the court under s. 17 Evidence Act, 1950.

(iii) The statement in cautioned statement P15 wherein she has admitted killing the deceased was accepted by the court based on the circumstantial principles established in *PP v. Dato' Mokhtar Hashim* [1983] 1 CLJ 138 HC and *Johnson Tan Han Seng v. PP* [1977] 2 MLJ 66.

[15] In this case the accused was alone with the deceased who was 10 months old. The deceased was under her care and control. There was no one who could say what happened that day except the accused. Nobody saw the accused put the deceased into the water container. The only evidence at this point of time is the confession that the accused had made to the husband PW3 and to Investigating Officer PW4 and in the cautioned statement. These circumstantial evidence point to only one fact – that it was the accused who was in charge of the deceased who had put the deceased in the water container and as a result the deceased died of drowning. The post-mortem report confirms this cause of death.

[16] At the end of the prosecution case I was satisfied that the prosecution had established a *prima facie* case based on the principles enumerated by the Court of Appeal in the case of *Looi Kow Chau & Anor v. PP* [2003] 1 CLJ 734 CA where the Court of Appeal stated:

> It is a duty of a Judge sitting alone to determine at the close of the prosecution's case, as a trier of fact, whether the prosecution had made out a *prima facie* case. He must subject the prosecution evidence to maximum evaluation and ask himself whether he would be prepared to convict the accused on the totality of the evidence contained in the prosecution's case if he were to decide to cal upon the accused to enter his defence and the accused had elected to remain silent. If the answer to that question is in the negative, then no *prima facie* case would have been made out and the accused would be entitled to an acquittal.

[17] This court then amended the charge as the name of the deceased had been erroneously miss-spelt in the charge and the time when the offence was committed became apparent in the course of the trial.

[18] The accused was allowed to enter her defence to the amended charge which read as follows:

Bahawa kamu pada 16.1.02 jam lebih kurang 8 pagi hingga 9 malam di rumah No. 8, Jalan Lembing 15, Taman Putra Wangsa, Ulu Tiram dalam Daerah Johor Bahru dalam Negeri Johor Darul Takzim telah melakukan pembunuhan dengan menyebabkan kematian kepada Lye Mei Jing Sijil Kelahiran No. 010306-04-0216 yang berumur 10 bulan dan oleh yang demikian kamu telah melakukan kesalahan yang boleh di hukum di bawah Seksyen 302 Kanun Keseksaan.

[19] The accused claimed trial to the amended charge and went on to give evidence. The accused called her only witness, the Psychiatric Dr. Nor Hashim Ahmad, to give evidence regarding her mental condition at the time of the incident and thereafter.

[20] The accused in her evidence testified that her daughter's (deceased) death was an accidental death. She denied murdering her child. On that day ie, 16 January 2002 she and the deceased were at home. She had fed her child and bathed her child. At about 4pm the accused was tired and she went to bed together with her daughter. When she woke up at about 5pm she found her daughter missing from the bed. She searched all over the house. She found her daughter in a water container (P7) which was half closed with its lid. She realized the child was dead and she immediately called her husband PW3. She informed him of what had happened to their daughter. She told her husband that she wanted the police to arrest her and to put her to death. She felt guilty that she was responsible for the death and therefore she should be punished. When her husband returned to the home on getting her phone call she told her husband PW3 that she wanted to die and that she was suicidal. She felt she was worthless, better off dead than alive. In her evidence she denied she put her child into the water container on 16 January 2002.

[21] When the prosecution cross-examined her on her admission in the cautioned statement (P15) dated 22 January 2002 that she put the child into the container the accused replied that she created this story to the police so that she can be hung to death as she felt she was responsible for her child's death. She blamed herself.

[22] The accused further stated that two weeks before the incident she was under mental depression as she had to resign from teaching because she could not do a good job. She admitted that she and her siblings are being treated at the General Hospital Malacca Psychiatric Unit and she had been on anti depressant tablets.

[23] Lately, she had not been on these tablets because the tablets were old and they have passed the expiry period.

[24] She testified that she had also told PW4 the I/O and the Officer who recorded the Cautioned Statement (P15) that she had killed the child but said that statement was not true as at that time immediately after the incident she blamed herself for the incident and was in a suicidal mood because of her depression as she had not been on medication. She stated that she concocted the story that she killed the child so that the police will hang her for her child's death.

[25] She further stated in evidence that the deceased child could walk for about 25 feet without any assistance and that the deceased could have walked up to the water container which was by the side of the toilet bowl.

[26] The defence called Dr. Nor Hashim (DW2) a Psychiatrist at Hospital Permai, Johor Bahru who examined the accused on 25 January 2002. PW2 confirmed that the accused told him that she did not know how the child died. DW2 received the accused's medical report and the medical reports of the accused two sisters who were all treated by Hospital Malacca. DW2 confirmed from the medical records that the accused was treated for depression and was given "Dothiaprice". This medicine was later changed to "fluboxamus" on 7 February 2002. The two sisters of the accused were also suffering from schizophrenia and psychotic disorder.

[27] After observation in the hospital DW2 concluded that the accused was suffering from psychiatric depression on the day of the incident (16 January 2002). This psychiatric depression is a form of unsoundness of mind which incapacitated her from knowing or recalling or understanding what actually happened. DW2 further testified that on the day of the incident it was possible for the accused to think that she was the cause of the death of her child even though she was not the cause. DW2 in cross examination by the prosecution said:

> Question: The accused had testified in this Court on 27.5.04 that she is well because she is taking medication. She now remembers and recalls clearly what happened on 16.1.02. She testified that her daughter's death was an accidental death. She said the child drowned in a water container when she woke up.
>
> Is it possible for the accused to recall now how her daughter met her death even though it happened when she was of unsound mind?
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> Answer: It is possible because human memory depends on motion to recall. Therefore in this case it is possible that after the accused's mood becomes better she is capable of recalling the truth of the incident.

[28] Based on the above evidence this court has to reconsider the issue as to how and the manner in which the deceased had died. Based on the confession made by the accused to the I/O (PW4) in the cautioned statement (P15) it was the accused who had placed the child into the water container.

[29] On the other hand the accused has now retracted from her confession and she says she did not place the child in the water container but made up a story that she killed the child because of her suicidal tendencies and blamed herself for the killing so that the police can put her to death.

[30] The accused is not denying that she made up the confession to the police and in her cautioned statement.

[31] The accused now relies on her mental depression to show that the confession was fabricated and that she did not place the child in the water container.

[32] The psychiatric (DW2) was not called by the prosecution but offered to the defence. This court has no reason to disbelief or reject his evidence. On the totality of the evidence DW2 has presented it appears that the accused is suffering from psychiatric depression and there is a family history of schizophrenia. The accused was not taking her medication for depression and at the time she was suffering from psychiatric depression and was having suicidal thoughts. In fact DW2 even testified that in January 2002 the accused's cognitive faculties were impaired and that in January 2002 it was possible for the accused to think that she was the cause for the death of her child even though she was not the cause.

[33] With this evidence there is no evidence as to who had placed the child in the water container. There is the evidence that the child could walk and climb the toilet bowl. In such factual circumstances a doubt arises as to whether the child got up from bed when the accused was sleeping, crawled or walked up to the container and tried to climb on top of the toilet bowl and had accidentally fallen into the water container, the stand the defence has taken.

[34] Now the issue this court has to consider is whether the defence has cast a reasonable doubt on the prosecution's case.

[35] In *Ganapathy a/l Rengasamy v. PP* [1998] 2 CLJ 1 FC at p. 7 Federal Court had said:

A ... It needs to be remembered that however weak a defence may be, trial judges being judges of both fact and law should not just brush aside the defence on the basis that the prosecution witnesses are to be believed and not the defence. Where the law casts the onus of giving an explanation upon an accused person, and the explanation is given, which is consistent with innocence, the court is duty bound to
B consider whether it might reasonably be true, although not convinced of its truth. On the issue of the court's duty to consider the defence, the age old decision in *Mat v. PP* [1963] MLJ 263 is still good law today as it was then.

[36] The defence has also raised the motive issue as required under
C s. 8(1) Evidence Act 1950. In this case there is no evidence of any motive for the killing. The accused loved her child. There is no evidence in the post-mortem report that the child was bruised. The accused had bathed the child on two occasions on the day of the incident. The child was well nourished.

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[37] Since there was no evidence of any motive there is a doubt as to whether the accused in fact had killed the deceased except for her alleged confession.

[38] What is the weight to be given to the confession to the police
E and in her cautioned statement.

[39] In view of the evidence of the DW2 (Dr. Nor Hashim) it is highly prejudicial and dangerous to depend solely on the confession made by the accused. It appears that the accused had contradicted
F herself when she retracts the confession. The accused says she concocted the story at that time because of her suicidal tendencies so that she can be punished for her daughter's death. She took the blame. The psychiatric says that it is normal for persons suffering from psychotic depression to create these stories so that she can be hanged
G for the offence.

[40] Based on the above evidence and the medical report of the accused this court is of the view that a reasonable doubt has been created as to whether in fact it was the accused who had killed the child or was the death accidental as claimed by the defence.

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[41] This court is not prepared to convict the accused solely based on the confession (which has been thrown into doubt) when there is evidence that the accused was suffering from psychotic depression and had not been under medication coupled with the evidence from the defence that when she confessed it was not because she had killed the
I child but because by so saying she could be hanged and in this way satisfy her suicidal tendencies.

[42] DW2 confirms this theory and he is satisfied that at that time of the incident the accused was suffering from psychotic depression bordering on unsoundness of mind which incapacited her from knowing or recalling or understanding what had actually happened. It is in these circumstances that the confession was made. This court therefore holds that the confession (upon full scrutiny by this court) is unreliable, prejudicial and concocted by the accused and to rely on such a confusion given by a person suffering from mental depression and delusion would be unfair and defeats the ends of justice.

[43] This court has also to bear in mind and consider whether the child's death was accidental. This court does not discount the possibility that the child who could walk had crawled or walked to the water container and climbed the toilet bowl and had accidentally fallen into the water container as there is evidence that the child can walk and had climbed the toilet bowl before.

[44] The only evidence in the absence of the confession is that the accused was last seen with the child and this mere fact does not infer that the accused had committed murder. Other than this fact there are no other circumstances that show that the accused could have killed the child.

[45] In *PP v. Hanif Basree Abd Rahim* [2004] 3 CLJ 700 HC, Abd. Hamid b Embong J said on p 732:

> Mere fact that they were last seen together does not necessarily lead to an irresistable inference that the accused had committed this crime, although that circumstance is an incriminating nature against the accused. There must be other circumstances that may go to show that the accused does not commit this murder.

[46] In this case there are two sets of circumstances from which inferences can be drawn. One was based on the confession which connects the accused to the crime and the other the accused testimony corroborated by the psychiatrist (DW2) who said that the confession was made during the period when the accused was suffering from psychotic depression and delusion with suicidal tendencies and thereby the confession could be fabricated to ensure that the police could hang her.

[47] In *Tai Chai Ket v. PP* [1948-1949] MLJ 105, Spencer Wilkinson J said:

> ... when there is more than one inference which can reasonably be drawn from a set of facts in a criminal case we are of the opinion that the inference most favourable to the accused should be adopted...

[48] The court accepted the accused defence that she was in fact suffering from psychotic depression and having suicidal tendencies and the confession was made in these circumstances. In view of the lingering doubts as to whether the death of the child could be accidental this court is left with only one conclusion and that is to give the benefit of the doubt to the accused and acquit her of the amended charge. Consequently, I acquitted and discharged her.